U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-, INC.

DATE: OCT. 13, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a designer and manufacturer of electronic sensors, seeks to permanently employ the Beneficiary as an electrical design engineer under the immigrant classification of member of the professions holding an advanced degree. Immigration and Nationality Act (the Act) § 203(b)(2)(A); 8 U.S.C. § 1153(b)(2)(A). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director concluded that the record did not establish the Petitioner's continuing ability to pay the Beneficiary's proffered wage from the petition's priority date onward. Accordingly, the Director denied the petition on April 1, 2015.

On appeal, the Petitioner argues that the Director misstated the proffered wage. The Petitioner also asserts that its recent securement of a government project contract demonstrates its ability to pay the wage.

The record indicates that the appeal is properly filed and alleges specific errors in law and fact. The record documents the case's procedural history, which is incorporated into the decision. We will elaborate on the procedural history only as necessary.

We conduct appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence of record, including new evidence properly submitted on appeal.[1]

I. THE PETITIONER'S ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

[1] The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow the submission of additional evidence on appeal.

In the instant case, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL), accompanies the petition.[2] The petition's priority date is April 5, 2013, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d). The record before the Director closed on February 11, 2015, with his receipt of the Petitioner's response to his request for evidence.

A. The Proffered Wage

The labor certification states the proffered wage of the offered position of electrical design engineer as $60,133 to $65,629 per year. *See* U.S. Dep't of Labor, Emp't & Training Admin., Instructions for ETA Form 9089, Section G, at http://www.foreignlaborcert.doleta.gov/pdf/9089inst.pdf (accessed Oct. 6, 2015) (allowing the statement of a proffered wage as a range of wages); *see also* U.S. Dep't of Labor, Emp't & Training Admin., Final Rule on Labor Certifications for the Permanent Emp't of Aliens in the U.S., 69 Fed. Reg. 77326, 77348 (Dec. 27, 2004) (stating that "consistent with our longstanding policy, the employer may advertise with a wage range as long as the bottom of the wage range is no less than the prevailing wage rate").

In his decision, the Director stated the proffered wage as $76,000 per year, the wage rate stated by the Petitioner on the Form I-140, Petition for Alien Worker. The Petitioner argues on appeal that it need only demonstrate its ability to pay $60,133 per year, the low end of the proffered wage range stated on the ETA Form 9089.

Any U.S. employer "desiring and intending to employ" an alien as an advanced degree professional may file an immigrant visa petition. INA § 204(a)(1)(F), 8 U.S.C. § 1154(a)(1)(F). Before U.S. Citizenship and Immigration Services (USCIS) may grant such a petition, however, Congress directed the DOL to certify that there are insufficient workers who are able, willing, qualified, and available for the offered work, and that the alien's employment will not adversely affect the wages and working conditions of U.S. workers similarly employed. INA § 212(a)(5)(A)(i), 8 U.S.C. § 1182(a)(5)(A)(i).

To ensure that an alien's employment will not adversely affect the wages and working conditions of U.S. workers, the DOL requires proffered wages to equal or exceed the prevailing wage rate for the occupational classification in the area of intended employment. *See* 20 C.F.R. § 656.10(c)(1) (requiring a labor certification employer to attest that the proffered wage equals or exceeds the prevailing wage rate); *see also* 20 C.F.R. § 656.40 (describing the procedure for the determination of a prevailing wage

[2] A petition for an advanced degree professional must be supported by an original, certified labor certification signed by an employer, alien, and any attorney or agent. *See* 8 C.F.R. § 204.5(k)(4)(i); 20 C.F.R. § 656.17(a). The accompanying ETA Form 9089 contains copies, not originals, of pages 9 and 10. In response to the Director's request for evidence of November 19, 2014, the Petitioner stated that the missing original pages were "lost" and that it would request duplicate pages from the DOL. The copy of page 9 contains the Petitioner's original signature, attesting to the required conditions of employment, as well as to the truth and accuracy of the information on the ETA Form 9089. Under these circumstances, we consider the petition to be accompanied by a valid labor certification pursuant to 8 C.F.R. § 204.5(k)(4)(i).

rate). Thus, by statute and regulation, the DOL determines the proffered wage of an offered position, which is reflected in Part G of an ETA Form 9089.

The instant Petitioner stated on the Form I-140 that it would pay the Beneficiary more than indicated in Part G of the accompanying ETA Form 9089. However, the Petitioner must demonstrate its ability to pay the Beneficiary the proffered wage as certified by the DOL, which is at least $60,133 per year.

B. Evidence of the Petitioner's Ability to Pay

A petitioner's ability to pay a proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977). We require a petitioner to demonstrate financial resources sufficient to pay a beneficiary's proffered wage. However, we also consider the totality of the circumstances affecting a petitioner's business. *See Sonegawa*, 12 I&N Dec. at 614-15.

In determining a petitioner's ability to pay, we first examine whether the petitioner paid a beneficiary during the relevant period. We consider payments to a beneficiary that equaled or exceeded the proffered wage to be *prima facie* proof of a petitioner's ability to pay.

In the instant case, the Beneficiary attested on the accompanying labor certification to his employment by the Petitioner in various positions since May 10, 2005. The Petitioner submitted copies of payroll records from 2013.[3]

The 2013 payroll records consist of seven records for biweekly pay periods, ranging from January to October. The records indicate the Beneficiary's employment by the Petitioner for 35 hours per week at a rate of $36.06 per hour. Payment to the Beneficiary for a full year at the hours and rate indicated in the 2013 payroll records would result in wages exceeding the annual proffered wage of $60,133.

However, the payroll records do not indicate the Petitioner's employment of the Beneficiary for the full year of 2013. The records document only seven of 26 bi-weekly pay periods during the year. The latest of the payroll records, which states the Beneficiary's pay as of October 5, 2013, indicates the Petitioner's payment to the Beneficiary of a total of $15,145.20 that year, well below the annual proffered wage of $60,133.

Also, some of the 2013 payroll records indicate payments months after the Beneficiary reportedly performed the work. The records for the pay periods of December 30, 2012 through January 12, 2013; January 13, 2013 through January 26, 2013; and January 27, 2013 through February 9, 2013

[3] The Petitioner also submitted copies of the Beneficiary's IRS Forms W-2 Wage and Tax Statements for 2010, 2011, and 2012. However, these materials pre-date the petition's priority date of April 5, 2013. The Form W-2 for 2012 indicates the Petitioner's payment to the Beneficiary of more than the annual proffered wage. The wages on the other Forms W-2 do not equal or exceed the annual proffered wage.

state respective "Pay Dates" of May 10, 2013, May 24, 2013, and June 7, 2013. The Petitioner's apparent delay in paying the Beneficiary's wages suggests its possible lack of funds to immediately pay him and casts doubt on its continuing ability to pay the proffered wage. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

In addition, the Petitioner submitted copies of Forms W-2 on behalf of the Beneficiary for 2010, 2011, 2012, and 2014. However, the Petitioner did not submit a copy of a Form W-2 for 2013 or explain its absence. The unexplained absence of a Form W-2 for 2013 casts further doubt on the Petitioner's evidence of the Beneficiary's employment in 2013. *Id.* (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence). Thus, the record does not establish the Petitioner's ability to pay the proffered wage in 2013 based on the wages it paid the Beneficiary.

If a petitioner does not establish its employment of a beneficiary at an amount equaling or exceeding the proffered wage, we next examine the annual amounts of net income and net current assets, without consideration of depreciation or other expenses.[4] If a petitioner's annual amounts of net income or net current assets equal or exceed the annual proffered wage, we consider the petitioner to possess the ability to pay the annual proffered wage.

The instant Petitioner submitted a copy of its IRS Form 1120S U.S. Income Tax Return for an S Corporation for 2013. The tax return reflects annual net income of $(123,242).[5] The return also reflects annual net current assets of $(421,828).[6] Because the annual amounts of net income and net current assets reflected on the Petitioner's 2013 tax return are negative, the record does not establish its ability to pay the proffered wage in 2013 based on its net income and net current assets.

Thus, based on examinations of the wages the Petitioner paid to the Beneficiary, its net income, and its net current assets, the record does not establish its continuing ability to pay the Beneficiary's proffered wage from the petition's priority date onward.

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[4] Federal courts have upheld our method of determining a petitioner's ability to pay. *See River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Rizvi v. Dep't of Homeland Sec.*, -- Fed. Appx. --, 2015 WL 5711445 ** 1-2 (5th Cir. Sept. 30, 2015); *Tongatapu Woodcrafi Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 373-76 (S.D.N.Y. 2012); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011).

[5] Numbers in parentheses reflect negative amounts. Also, S corporations report their incomes on Schedules K of IRS Forms 11120S when they have income adjustments from sources other than a trade or business. *See* U.S. Internal Revenue Serv., Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed Oct. 6, 2015). The instant Petitioner's 2013 tax return did not report any adjustments to its income on Schedule K. We therefore consider the Petitioner's net income as reflected on Line 21 of its IRS Form 1120S.

[6] Net current assets represent the difference between current assets and current liabilities. Joel G. Siegel & Jae K. Shim, *Dictionary of Accounting Terms* 118 (3d ed., Barron's Educ. Series 2000). A corporation reports its year-end current assets on Lines 1 through 6 of Schedule L to IRS Form 1120S. Current assets generally consist of items that may be liquidated within one year, such as cash, marketable securities, inventory, and prepaid expenses. *Id.* Lines 16 through 18 of Schedule L reflect a corporation's year-end current liabilities. Current liabilities generally represent obligations payable within one year, such as accounts payable, short-term notes, and accrued expenses like taxes and salaries. *Id.*

The Petitioner also submitted copies of the Beneficiary's Form W-2 from 2014 and payroll records from 2015. However, the 2014 Form W-2 indicates the Petitioner's payment to the Beneficiary of $53,008.20, less than the annual proffered wage of $60,133.

The 2015 payroll records, from January 15 through April 18, indicate payment to the Beneficiary of $36.06 per hour for 70 hours worked every two weeks. As previously indicated, continuous payment at that rate for the entire year would exceed the annual proffered wage. However, January 15 through April 18 is an insufficient period in which to demonstrate an ability to pay a proffered wage, as business cycles and other economic factors may affect a petitioner's ability to pay over the course of an entire year. As previously discussed, the record indicates the Petitioner's payment of the Beneficiary at the same rate in 2013. However, the Petitioner's payments to the Beneficiary that year did not establish its ability to pay because the payments did not regularly continue. In addition, the Petitioner's ability to pay the proffered wage in 2015 would not demonstrate its ability to pay in 2013 or 2014.

On appeal, the Petitioner notes that it may submit additional evidence of its ability to pay. *See* 8 C.F.R. § 204.5(g)(2) (stating that, "[i]n appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner"). The Petitioner asserts its securement of a $150,000 contract from a federal agency in February 2015 that demonstrates its ability to pay.[7] The Petitioner submitted copies of an email message and an abstract of its proposal to the , which is part of the .

However, contrary to the Petitioner's assertion, the email message does not indicate award of a contract to the Petitioner. The message states that selected the Petitioner's proposal for a contract it "expects to award." The message states that "negotiations" must occur before a contract's award and that the email notification "must not be construed as an obligation on the part of the Government or be used as a basis for accruing costs to the Government prior to award of a contract."

The record also does not establish the value of the purported contract. Neither the email message nor the abstract submitted by the Petitioner indicate its future receipt of $150,000. *See INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (finding that counsel's unsupported assertions do not establish facts of record); *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citation omitted) (stating that assertions uncorroborated by documentary evidence are insufficient to meet the burden of proof in visa petition proceedings). Even if the email message and the abstract indicated the contract's value, that value may presumably change after "negotiations."

Moreover, even if the Petitioner established its receipt of a contract that would provide it with at least $150,000 in net income, the dates of the contract have not been established, and it is unclear when

[7] Counsel asserts that "[t]his contract is guaranteed income for [the Petitioner] in the amount of $150,000." The record is unclear whether the $150,000 amount would constitute gross or net income, or if this amount would be required to satisfy other corporate obligations.

payments, if any, would occur. Thus, the record is unclear whether the contract would establish the Petitioner's ability to pay in 2015 or thereafter.

As previously indicated, a petitioner must establish its continuing ability to pay a proffered wage from a petition's priority date. 8 C.F.R. § 204.5(g); *see also Great Wall*, 16 I&N Dec. at 145 (holding that a petitioner cannot expect to establish a priority date for visa issuance if it could not pay the proffered wage at the time of its job offer). The instant record indicates the Petitioner's receipt of notice of the selection of its proposal in February 2015. Thus, the record would not establish the Petitioner's receipt of revenue from the contract to pay the Beneficiary's proffered wage in 2013. Therefore, the contract purportedly secured by the Petitioner does not establish its continuing ability to pay the proffered wage.

In addition, USCIS records indicate the Petitioner's filing of an I-140 petition for another beneficiary that remained pending after the instant petition's priority date.[8] A petitioner must demonstrate its ability to pay the proffered wage of each petition it files. *See* 8 C.F.R. 204.5(g)(2); *Great Wall*, 16 I&N Dec. at 144. Therefore, the instant Petitioner must demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and the other beneficiary whose petition remained pending after the instant petition's priority date. The Petitioner must demonstrate its ability to pay the combined proffered wages from the instant petition's priority date until the other beneficiary obtained lawful permanent residence, or until the other petition was denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where the petitioner did not establish its ability to pay multiple beneficiaries).

The record does not indicate the priority date or proffered wage of the Petitioner's other petition. The record also does not indicate whether the Petitioner paid wages to the other beneficiary, whether the other beneficiary obtained lawful permanent residence, or whether the other petition was denied, withdrawn, or revoked. Thus, the record does not establish the Petitioner's ability to pay the combined proffered wages of the two beneficiaries.

As previously indicated, we may also consider the overall magnitude of a petitioner's business in determining its ability to pay the proffered wage. *See Sonegawa,* 12 I&N Dec. at 614-15. In *Sonegawa,* the petitioner conducted business for more than 11 years, routinely earning annual net income amounts of about $100,000. However, the petitioner's tax return for the year of the petition's filing did not reflect its ability to pay the proffered wage. During that year, the petitioner relocated its business, causing it to pay rent on two locations for a five-month period, to incur substantial moving costs, and to briefly suspend its business operations. Despite these setbacks, the Regional Commissioner determined that the petitioner would likely resume successful business operations and had demonstrated its ability to pay. The record identified the petitioner as a fashion designer whose work had been featured in national magazines. She demonstrated that her clients included the then Miss Universe, movie actresses, society matrons, and women included on lists of the best-dressed in California. She also documented that she lectured at design and fashion shows throughout the United States and at California colleges and universities.

[8] USCIS records identify the receipt number of the other petition as

As in *Sonegawa*, we may consider evidence of a petitioner's ability to pay beyond its net income and net current assets. We may consider such factors as: the number of years a petitioner has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation within its industry; whether the beneficiary will replace a current employee or outsourced service; and other evidence of its ability to pay a proffered wage.

In the instant case, the record indicates the Petitioner's continuous business operations since 2000. On the accompanying labor certification, the Petitioner claimed 12 employees. However, on the Form I-140, it claimed only three. The Petitioner's most recent tax returns of record show that its gross annual revenues and payroll expenses dropped by more than half from 2012 to 2013. The record reflects that the Petitioner had negative amounts of net income and net current assets in 2012 and 2013, the year of the petition's priority date. Nothing of record demonstrates an inaccurate financial picture painted by the Petitioner's tax returns.

Unlike in *Sonegawa*, the record does not indicate the occurrence of any unusual business expenditures or losses, or the Petitioner's outstanding reputation in its industry. The record also does not indicate the Beneficiary's replacement of a current employee or outsourced service. In addition, unlike the petitioner in *Sonegawa*, the instant Petitioner must demonstrate its ability to pay the combined proffered wages of multiple beneficiaries.

Thus, assessing the totality of the circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's denial of the petition.

II. THE BENEFICIARY'S QUALIFYING EXPERIENCE

Beyond the Director's decision, the record also does not establish the Beneficiary's qualifying experience for the offered position.[9]

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by the petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of the labor certification to determine the minimum requirements of the offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

[9] We may deny a petition on valid grounds unidentified by a director. *See* 5 U.S.C. § 557(b) (stating that, except as limited by notice or rule, an agency retains all the powers on review that it had in issuing an original decision).

In the instant case, the accompanying labor certification states the minimum requirements of the offered position of electrical design engineer as a Master's degree or a foreign equivalent degree in electrical engineering and at least 12 months of experience in "[e]lectrical [d]esign." On the labor certification, the Beneficiary attested to three years of qualifying experience in electrical design with the Petitioner before starting work in the offered position with the Petitioner on October 1, 2010.

Unless a labor certification employer can demonstrate the infeasibility of training a U.S. worker to qualify for the offered position, an alien cannot gain qualifying experience with that employer in a position "substantially comparable" to the offered position. 20 C.F.R. § 656.17(i)(3). The term "substantially comparable" means "a job or position requiring performance of the same job duties more than 50 percent of the time." 20 C.F.R. § 656.17(i)(5).

In the instant case, the labor certification states that the Beneficiary spent the following percentages of time on his prior duties in electrical design with the Petitioner: 25 percent on analyzing test results of electronic modules; 20 percent on designing communication interfaces for web application firmware; 20 percent on preparing documentation, reports, and drawings; 20 percent on design validation for manufacturing; and 15 percent on designing and developing analog and digital circuits.

The labor certification states that the Beneficiary currently spends the following percentages of time on the duties of the offered position of electrical design engineer: 20 percent on conceptual design of new products and feasibility analysis; 20 percent on designing core analog and digital electronic modules and firmware; 20 percent on customer interaction, product support, and management; 15 percent on project management, integration of smaller modules, and mentoring interns; 10 percent on design validation for manufacturing; 10 percent on analyzing test results of electronic modules; and 5 percent on preparing documentation, reports, and drawings.

Thus, the labor certification indicates that, in the offered position, the Beneficiary performed the same job duties as he did in electrical design less than 50 percent of the time. The labor certification indicates that the Beneficiary spent 45 percent of his time in the offered position performing the same job duties, including: 10 percent on analyzing test results of electronic modules; 5 percent on preparing documentation, reports, and drawings; 10 percent on design validation for manufacturing; and 20 percent on designing analog and digital electronic modules.

However, USCIS records indicate that the information on the accompanying labor certification conflicts with the Beneficiary's attestation on another labor certification. The Beneficiary submitted a Form ETA 750B, Application for Alien Employment Certification, in 2013 with his self-petition as an alien applying for a "national interest waiver" as an advanced degree professional. *See* INA § 203(b)(2)(B) (waiving a job offer requirement if USCIS deems the prospective employment to be "in the national interest"). On the other labor certification, dated September 16, 2013, the Beneficiary stated his employment by the Petitioner in the offered position of "[e]lectrical [d]esign [e]ngineer" since October 2007. As previously indicated, on the instant labor certification, the Beneficiary attested to working in "[e]lectrical [d]esign" from October 1, 2007 to September 30, 2010 and in the offered position since only October 1, 2010. Also, in an August 27, 2013, letter in support of the

Beneficiary's national interest waiver petition, the Petitioner's president stated that the Beneficiary "has been working for me for the past [six] years as a [s]enior [e]lectrical [e]ngineer."

The inconsistent dates and titles of the Beneficiary's employment by the Petitioner cast doubts on his claimed qualifying experience for the offered position. *See Ho*, 19 I&N Dec. at 591-92 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence). The record does not establish the Beneficiary's possession of at least 12 months of experience in an "[e]lectrical [d]esign" occupation requiring performance of the same job duties as the offered position less than 50 percent of the time. The record therefore does not establish the Beneficiary's possession of the qualifying experience specified on the accompanying labor certification by the petition's priority date.

III. CONCLUSION

The record does not establish the Petitioner's continuing ability to pay the Beneficiary's proffered wage from the petition's priority date onward. We will therefore affirm the Director's denial of the petition. Also, the record does not establish the Beneficiary's possession of the qualifying experience specified on the accompanying labor certification by the petition's priority date.

The petition will be denied for the above stated reasons, with each considered an independent and alternative basis for denial. In visa petition proceedings, a petitioner bears the burden of proving eligibility for the benefit sought. INA § 291, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The instant Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of E-, Inc.*, ID# 14527 (AAO Oct. 13, 2015)